(9) (12)

Nos. 87-1589 & 87-1888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

G. Edward Yurcon
THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY
780 Commerce Court
Four Station Square
Pittsburgh, Pennsylvania 15219
(412) 263-3806
(Counsel for Petitioner)

Richard L. Wyatt, Jr.
(Counsel of Record)
Ronald M. Johnson
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

November 22, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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The Pittsburgh & Lake Erie Railroad Company ("P&LE") respectfully submits this Supplemental Brief, pursuant to Rule 22.6 of the Rules of this Court, in response to new arguments and factual assertions raised by the Railway Labor Executives' Association ("RLEA") in its Supplemental Brief filed in reference to *The Pittsburgh & Lake Erie Railroad Company v. Railway Labor Association*, No. 87-1589 ("*P&LE I*") and No. 87-1888 ("*P&LE II*"). RLEA's Supplemental Brief, filed on the eve of what P&LE hopes is the definitive conference, is RLEA's latest tactic in its by now obvious effort to frustrate P&LE's attempts to obtain prompt Supreme Court review of its cases.[1]

RLEA's latest Brief suggests that *P&LE I* and *II*, while offering this Court a single opportunity to consider all the issues raised in the other pending cases, nonetheless "suffer( ) from one major defect." RLEA Supplemental Brief at 5. The alleged defect is that the *P&LE* cases may be rendered moot by what RLEA characterizes as "negotiations" between itself, P&LE, and P&LE's creditors that are designed to "find a solution to the carriers' (sic) financial plight." *Id.* Thus, because a "successful resolution" of

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[1] The letter from RLEA's financial advisor that is referred to and upon which RLEA bases its assertion that *P&LE II* may become moot was not made available to P&LE until 9:30 A.M. on Monday, November 21, 1988, four days after the filing of RLEA's latest Supplemental Brief. P&LE's weekend request for a copy of the letter from counsel for RLEA went unheeded. Thus, P&LE has been forced to respond in extremely short order to RLEA's ploy. RLEA's "eleventh-hour" filing of the Supplemental Brief and letter to this Court are the latest example of the tactics of delay that RLEA has pursued throughout this litigation. *See* Letter from Richard L. Wyatt, Jr. to Joseph F. Spaniol, Jr. (May 23, 1988) (discussing in detail past instances of RLEA delaying tactics) (attached hereto as Appendix A).

these "negotiations" may include an agreement by RLEA to dismiss all actions against P&LE, RLEA recommends that this Court accept as the vehicle for Supreme Court review several of the other pending cases.[2] *Id.* at 5-6. RLEA long ago acknowledged that *P&LE I* and *II* both presented to this Court all the issues worthy of review. Originally RLEA advocated, for reasons entirely different than those it now raises, that certiorari be granted in cases other than the *P&LE* cases. RLEA's latest attempt to avoid or postpone certiorari in both *P&LE I* and *P&LE II* is both disingenuous and, as a result of its deliberate timing, outrageous.[3]

The original sale of P&LE was frustrated as a result of the Third Circuit's affirmance of an order compelling the prospective

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[2] RLEA also asserts that the United States was mistaken in its *amicus* brief when it took the position that *RLEA v. Guilford Transp. Indus., Inc.*, No. 87-2049 (lst Cir. 1988), is not the proper vehicle for addressing the issues raised in *P&LE II* regarding rail transactions under § 10901 of the Interstate Commerce Act, ("ICA"). RLEA Supplemental Brief at 4. RLEA maintains that *Guilford* raises the same issues as *P&LE II* "once it is accepted" that the case did not involve § 11341(a) of the ICA. *Id.* However, the district court decided *Guilford* based on §§ 11341 and 11347. *See RLEA v. Guilford Transp. Indus., Inc.*, 667 F. Supp. 29, 34-36 (D. Me. 1987). Therefore, it is now inappropriate for RLEA to request that this Court treat *Guilford* as a case involving a § 10901 transaction. To do as the RLEA requests would force the Court to decide issues not raised or litigated in the lower courts which is something it is generally reluctant to do. *See Springfield v. Kibbe*, 480 U.S. 257, 258 (1987); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977); *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957).

[3] RLEA's last-minute attempt to distract this Court from consideration of *P&LE I* and *II* by claiming it may soon become moot is without legal merit. The current controversy is among the class of disputes that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The dilemma facing P&LE falls within this doctrine. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

purchaser of P&LE's assets to either assume the existing labor agreements and organizations or await the outcome of protracted Railway Labor Act, 45 U.S.C. § 151, *et seq.*, ("RLA"), bargaining procedures between P&LE and its unions. Since then P&LE has been forced to shop for a purchaser who was willing to accept all P&LE's employees, the labor unions, and their contracts as a condition of the purchase of P&LE's assets. There has been none.

In the seven months since the Third Circuit's decision in *P&LE II* there has been only one serious proposal to purchase P&LE. That proposal was jointly sponsored by RLEA and CSX Transportation, Inc. ("CSXT"), a major class I railroad. Cumbersome negotiations were undertaken involving CSXT and P&LE on the one hand and, on the other hand, RLEA, all 13 of P&LE's unions, and the proposed new company that would purchase the rail assets. Those negotiations lasted almost six months. The proposal ultimately foundered when RLEA was unable to obtain the agreement of all of P&LE's union to the terms of an agreement negotiated by RLEA's investment advisor. (Copies of the correspondence terminating the purchase agreement are attached hereto as Appendix B).

Contrary to the assertions made in the self-serving letter of RLEA's financial advisor, RLEA has not negotiated in order to "find a solution" to P&LE's financial plight. As noted in the Declaration of Gordon E. Neuenschwander, no purchaser is willing to buy the railroad's assets with the employee complement as it now exists. (Attached hereto as Appendix C). RLEA recognizes this fact and has used the appellate court order and the RLA bargaining process as leverage in its attempt to force P&LE to sell its rail assets to RLEA and its members.

It was just this type of economic coercion and illegitimate use of the bargaining rights granted by Congress that this Court

criticized in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In *First National Maintenance*, it was feared that forcing management to bargain with unions over decisions involving the exercise of management prerogative, such as the decision to go partially out of business, would give the unions a "powerful tool for achieving delay, a power that might be used to thwart management's intention in a manner unrelated to any feasible solution the union might propose." *Id.* at 683. That fear has been realized in the present case as P&LE has been forced to suffer continuing financial losses while RLEA delays meaningful RLA bargaining and simultaneously furthers its own private agenda. Such an agenda is completely unrelated to any legitimate role labor unions should play in managerial decisions of this nature. RLEA is not seeking through RLA negotiations a solution for P&LE's plight; instead it is using its court-granted leverage to coerce P&LE and its creditors to sell the railroad assets on terms it dictates.

While P&LE is still attempting to sell its assets, as a practical matter no sale can be completed unless RLEA agrees to it. Over the past year, despite P&LE's enormously expensive efforts, RLEA and its members have frustrated all potential sales. Should this Court decide not to grant review based solely on RLEA's self-serving assertion that a settlement "might" occur, it would allow RLEA to continue its tactics of delay and drive P&LE closer to either a forced sale to RLEA or complete abandonment and liquidation. Based on RLEA's tactics in both negotiations and this litigation which have to date thwarted all of P&LE's efforts to sell its railroad, RLEA's latest claim of possible mootness should be viewed as a transparent attempt to evade review by this Court.

Finally, P&LE notes that with the sole exception of RLEA, all who have voiced an opinion on whether this Court should review *P&LE I* and *II* now agree that it is the best vehicle for addressing

the vital issues facing the rail industry.[4] P&LE can only conclude that RLEA's disingenuous dissent from that consensus must be due either to its fear of an unfavorable disposition of the matter by this Court or its misguided desire to pervert the RLA process ordered by the Third Circuit into a forced fire sale of P&LE.

CONCLUSION

For the reasons set forth herein and in its previous petitions for a writ of certiorari, P&LE respectfully urges that this Court grant the petitions for certiorari in No. 87-1589 and No. 87-1888.

Respectfully submitted,

RICHARD L. WYATT, JR.
(Counsel of Record)
RONALD M. JOHNSON
(Counsel for Petitioner)
AKIN, GUMP, STRAUSS, HAUER
& FELD
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

G. EDWARD YURCON
(Counsel for Petitioner)
The Pittsburgh & Lake Erie
Railroad Company
780 Commerce Court
Four Station Square
Pittsburgh, Pennsylvania 15219
(412) 263-3806

Dated: November 22, 1988

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[4] *See, e.g.*, Brief for National Railway Labor Conference as *Amicus Curiae* at 19; Brief for United States as *Amicus Curiae* at 6, 19; Memorandum of the Interstate Commerce Commission at 4-5.

APPENDIX A

May 23, 1988

Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
One First Street, N.E.
Room G-22
Washington, D.C. 20543

Re: The Pittsburgh & Lake Erie Railroad Company
v. Railway Labor Executives' Association,
No. 87-1589

Dear Mr. Spaniol:

I write on behalf of The Pittsburgh & Lake Erie Railroad Company ("P&LE"), Petitioner in the above-entitled action, to oppose the Railway Labor Executives' Association's ("RLEA") second request for an extension of time for filing its opposition to P&LE's first petition for a writ of certiorari (No. 87-1589). If RLEA's request for an extension of time to and including May 31, 1988 has already been granted, P&LE hereby requests that it be submitted to the Court pursuant to Supreme Court Rule 29.4 and the extension withdrawn.

RLEA's request for an extension of time is an underhanded attempt to ensure that the Court will not be able to act on P&LE's petition before the summer recess and ultimately that P&LE will not be able to gain the Court's review of this case before P&LE is

forced into liquidation and abandonment. Moreover, this latest request for an extension of time is part of a larger RLEA plot to exploit P&LE's need to gain prompt review of this case. RLEA is involved in a joint venture with CSX Transportation whereby the two are negotiating for the purchase of P&LE's rail lines. Apparently RLEA hopes that its dilatory actions will eventually push P&LE so close to liquidation and abandonment that P&LE will be forced to sell its rail lines at a discount to RLEA or to a buyer approved by RLEA.

RLEA has engaged in a pattern of dilatory actions whenever delay suited RLEA's litigation strategy. RLEA has fully supported expeditious handling of this case when it suited RLEA's purpose, but has repeatedly argued for extensions of time based on counsel's busy litigation schedule, when delay would be to RLEA's advantage. When the district court on October 8, 1987, enjoined RLEA's strike of the P&LE, RLEA filed an emergency appeal seeking, and receiving, summary reversal. RLEA fully complied with a briefing schedule that permitted the Third Circuit to hear oral argument on the district court's October 8 order on October 21, 1987. But when P&LE sought the same expedited treatment for its appeal of the second district court decision in this case (decided November 23, 1987), RLEA failed to comply with the Third Circuit's briefing schedule, causing the Third Circuit to postpone oral argument on that appeal to January 8, 1988. (See Exhibit A, excerpt of transcript of oral argument.)

Now that P&LE is once again seeking prompt review of an adverse ruling, RLEA is again seeking delay based on counsel's busy litigation schedule.[1] RLEA's true motive for seeking further time for filing its opposition (i.e., delay designed to ensure that P&LE will be unable to gain this Court's review before being forced into liquidation and abandonment) is revealed by the information that RLEA chose not to include in its requests for extension of time. Counsel for RLEA contacted counsel for P&LE regarding its first request for an extension of time for filing its opposition and was informed that P&LE would oppose any such request due to its need to gain this Court's prompt review. RLEA then filed its first request with the Clerk's Office on a Friday afternoon without first informing counsel for P&LE of the filing (the filing was sent to counsel for P&LE by regular mail) and without informing the Clerk of P&LE's opposition to this extension of time. By the time counsel for P&LE learned of the filing, the extension had already been granted. RLEA's second extension of time was likewise filed on a Friday afternoon, this time without any prior consultation with counsel for P&LE. RLEA failed to note in this second request that P&LE had, three days previously, filed a Motion for Expedited Consideration of this and its subsequent petition for certiorari in this case (No. 87-1888) (attached as Exhibit B), seeking expedited treatment of these petitions based on P&LE's

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[1] While P&LE sought and obtained a sixty-day extension of time for filing its first petition for certiorari, it is not inconsistent or unfair that P&LE now opposes RLEA's second request for an extension of time for filing its opposition to that petition. P&LE's extensions of time for filing its first petition were sought for the sake of judicial economy and expedition. P&LE had hoped that the Third Circuit would issue its decision in the second emergency appeal in this case prior to the deadline for filing the first petition, so that P&LE could have sought review (if even necessary) of both decisions simultaneously.

inability to continue in operation, if judicial review is not soon granted.[2] Counsel for RLEA failed to note the pendency of this Motion for Expedited Consideration in its request for extension of time despite the obvious impact that an extension of time would have on P&LE's ability to gain review of its petition for certiorari before the summer recess.

Given P&LE's need for expedition (as is fully explained in P&LE's Motion for Expedited Consideration and the accompanying affidavit, see Exhibit B), given the ample time allotted to RLEA to respond to P&LE's petition (60 days thus far), and given RLEA's transparent attempt to use this unnecessary delay as a strategy to

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[2] John O'B. Clarke, counsel for RLEA has been well aware of P&LE's plans to seek expedited handling of its petitions. A copy of P&LE's Motion for Expedited Consideration was hand-delivered to Mr. Clarke's office on May 17, 1988, three days before Mr. Clarke presented RLEA's latest request for an extension of time. Moreover, on April 27, 1988, P&LE filed a Supplemental Brief to its first petition (No. 87-1589), noting that it planned to file a Motion for Expedited Consideration along with its second petition. (See Exhibit C.) Additionally, on April 28, 1988, counsel for P&LE contacted Mr. Clarke and informed him that P&LE intended to file its second petition and Motion for Expedited Consideration around May 10, 1988, and planned to seek review of both petitions before the summer recess. Finally, on Saturday, May 21, 1988, upon learning of RLEA's latest request for an extension of time, counsel for P&LE telephoned Mr. Clarke's office. Although Mr. Clarke was not in and was not expected in, counsel for P&LE left a message with Don Griffin of that office informing Mr. Clarke that P&LE would oppose his request for an extension of time.

enhance its bargaining and litigation position, RLEA's request for an extension of time should be denied.

Respectfully submitted,

/s/ Richard L. Wyatt, Jr.
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

Attachments

cc: John O'B Clarke, Jr.
Highsaw & Mahoney
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(hand delivery)

APPENDIX B

October 3, 1988

CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Attention: Mr. Paul R. Goodwin
Senior Vice President

Gentlemen:

On July 29, 1988, The Pittsburgh & Lake Erie Railroad Company and CSX Transportation, Inc. entered into a letter of intent concerning the proposed purchase of certain of the assets of P&LE by a new entity to be created by Rail Labor Executives' Association with financing to be provided by CSX. It is our understanding that you have previously advised RLEA that, due to its failure to obtain required consents from P&LE's unions to the proposed transaction, you were withdrawing your offer of financial assistance. We also previously advised Brian Freeman, the financial advisor to RLEA, that if certain conditions were not satisfied by August 31, 1988, the P&LE would terminate the transaction described in the letter of intent.

Notwithstanding the fact that CSX had previously withdrawn its offer of financial support and that the deadlines imposed by P&LE had expired, we continued to have discussions with RLEA and with certain of the P&LE unions in an effort to obtain the various consents required to enable us to proceed with

this transaction. While it had initially appeared that agreement could be reached, we have not received a communication from the Transport Workers Union advising us that the most recent proposal has been rejected by the RLEA Task Force. We have, therefore, concluded that it would be unproductive to continue discussions with RLEA concerning the transaction contemplated by the letter of intent. Accordingly, and pursuant to the provisions of Paragraph L of the letter of intent, we are herewith notifying you that the letter of intent is terminated.

We appreciate the time and cooperation of your people over the past several months in working with us toward consummation of the transaction embodied by the letter of intent and we regret that the parties have not received the required cooperation and approval from rail labor. While the letter of intent has been terminated, we anticipate working with you to consider whether some other transaction might be available which would be in the best interests of P&LE and CSX.

Very truly yours,

/s/ Gordon E. Neuenschwander

bcc: C.R. Holley
G.E. Yurcon
D.F. Heckathorne

R.W. Kleinman

September 8, 1988

Mr. Brian M. Freeman
Lowenstein Sandler
65 Livingston Avenue
Rosalind, NJ 07068

Mr. K. C. Morriss
c/o P&LE
Commerce Ct
4 Station Square
Pittsburgh, PA 15219

Dear Brian and Ken,

I received the copies of agreements in principal signed by most of the P&LE general chairmen. Although Brian expressed the hope that he could secure the remaining agreements and resolve the contingencies or qualifications involved, it appears that there are a number of remaining issues being questioned in Newco's proposed agreements, the severance formula is still undetermined and any early timetable for securing ratification by all the unions will not be accomplished.

With the September 1st date now passed and the prospects for concluding agreements still uncertain, CSX Transportation is hereby withdrawing its offer of financial support for the new company proposed to operate the P&LE's business.

So there will be no misinterpretation of our further involvement with P&LE, you should know that we intend to meet with them on September 16th to propose a competing alternative offer to secure the assets we feel are important to CSX Transportation as they liquidate.

We regret that our venture was not concluded successfully, but feel that further delay reduces the already modest chances of a successful enterprise.

Sincerely,

/s/ Paul

APPENDIX C

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Petitioner,	)	
v.	)	Nos. 87-1589 & 87-1888
RAILWAY LABOR EXECUTIVES' ASSOCIATION, INTERSTATE COMMERCE COMMISSION, Respondents.	)	

DECLARATION OF GORDON E. NEUENSCHWANDER

I, GORDON E. NEUENSCHWANDER, do hereby declare as follows:

1. I am the President and Chief Executive Officer of The Pittsburgh and Lake Erie Railroad Company ("P&LE") and have been at all relevant times.

2. Since the Order of the United States District Court Judge Bloch and its affirmance by the United States Court of Appeals for the Third Circuit in RLEA v. Pittsburgh & Lake Erie Company, 845 F.2d 420 (3rd Cir.) petitions for cert. pending, Nos. 87-1888 and 88-217 (1988), P&LE has continued to seek a buyer for all of its railroad assets.

3. The original attempt by P&LE to sell its railroad lines was a sale transaction between P&LE and P&LE Railco, Inc.

("Railco") which was terminated shortly after the Third Circuit's opinion was issued because the parties were unwilling to await the outcome of protracted court-ordered Railway Labor Act ("RLA") negotiations with P&LE's 14 unions. Moreover, Railco was unwilling to accept all of the existing collective bargaining contracts, unions, and employees, as a condition of the purchase of the assets of P&LE.

4. Thereafter, several other potential purchasers expressed an interest in buying all or part of P&LE's railroad assets. However, as a result of the Third Circuit decision, P&LE had, as a practical matter, to obtain the approval of its unions as a precondition to any new sale proposal. Otherwise P&LE's unions could simply stop any sale through insistence that the purchaser assume all of P&LE's existing employees, unions, and labor contracts, or absent such agreement, strike, as they did to stop the sale to Railco.

5. The second transaction presented to P&LE was an RLEA-sponsored proposal to be financed by CSX Transportation, Inc. ("CSXT"). CSXT is a large railroad whose employees are also represented by some of the unions which represent P&LE's employees. Under the RLEA-CSXT proposal, an employee-owned company to be called Newco would have acquired the assets of P&LE, which would have thereafter been operated as a new carrier after obtaining I.C.C. approval. Ironically, this union-sponsored proposal called for essentially the same reductions in the number of jobs and types of work rule changes as in the original sale proposal with Railco, which triggered the union opposition to that sale. Negotiations were conducted between CSXT and P&LE on the one hand, and RLEA and Newco on the other. RLEA was represented in those negotiations by Mr. Brian M. Freeman, an investment advisor for the Railway Labor Executives' Association.

6. After the Third Circuit's decision, P&LE also undertook bargaining over the effects of any sale on its employees. During the course of the purchase negotiations between RLEA and Newco, RLEA essentially requested that P&LE forego Railway Labor Act ("RLA") effects bargaining as required by the Third

Circuit. While P&LE was reluctant, it did so because the RLEA assured P&LE that it was entering the sale negotiations in good faith and that RLEA and its members would do everything possible to achieve an expeditious settlement and sale of P&LE's assets to an employee-owned purchaser, Newco.

7. Over the summer of 1988, CSXT and P&LE negotiated and executed a Letter of Intent for the sale of P&LE's assets. This letter contained several conditions, including a condition that P&LE's unions agree to the sale. Newco and RLEA, however, were never able to reach an agreement supported by all of P&LE's unions. After at least one of P&LE's unions indicated it opposed the RLEA-Newco proposal, P&LE and CSXT terminated the Letter of Intent, and CSXT withdrew from its participation in the proposed joint venture with RLEA.

8. P&LE has now asked the National Mediation Board to resume the court-ordered RLA effects negotiations. P&LE has received no assurance from RLEA or the rail unions it represents that these negotiations will be concluded expeditiously. In my opinion, the likelihood of negotiating an effects agreement with RLEA and P&LE's unions is highly uncertain.

I declare under penalty of perjury that the foregoing is accurate to the best of my knowledge and belief.

/s/ Gordon E. Neuenschwander